IN THE
SUPREME COURT OF MISSOURI

Thomas G. (Jerry) and Nancy S.THOMPSON, Richard MONTGOMERY, James R. and Barbara M.CAMPBELL, M. Scott and Stacy HAUSMAN (Hausman Trust), William M. McDANIEL, Ralph C. McDANIEL, Stanley (Liston) and Martha KING, and Patricia HOFF,	)
Appellants,	)
v.	) No. SC85225
Clark HUNTER – Morgan County Collector, MORGAN COUNTY R-II SCHOOL DISTRICT, and Jeremiah NIXON ,Attorney General of the State of Missouri,	)
Respondents.	)

Appeal from the Morgan County Circuit Court
Twenty-Sixth Judicial Circuit
Honorable Mary Dickerson

APPELLANTS' INITIAL BRIEF

ANDERECK, EVANS, MILNE, PEACE & JOHNSON, L.L.C.
Craig S. Johnson MO Bar No. 28179
Lisa Cole Chase MO Bar No. 51502
The Col. Darwin Marmaduke House
700 East Capitol Avenue
Post Office Box 1438
Jefferson City, Missouri 65102
Telephone: (573) 634-3422
Facsimile: (573) 634-7822

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered upon motions to dismiss and to strike filed by the Respondents. Plaintiffs filed suit against Clark Hunter, in his official capacity as the Collector of Morgan County, the Morgan County R-II School District, and Jeremiah Nixon, in his capacity as Attorney General of the State of Missouri. Declaratory Judgments were sought with respect to the effect of 1998 "Amendment No. 2," which amended Section 11 of Article X of the Missouri Constitution.

Declarations were sought as to how Amendment No. 2 affected the application of Section 22(a) of Article X of the Missouri Constitution, as well as how Section 22(a) affects application of Chapter 163 R.S.Mo. To the extent Defendant School District's 2001 property tax levy rate was in excess of the maximum authorized current levy allowed by Section 22(a), Plaintiff property taxpayers sought refunds of the excessive taxes paid under protest pursuant to Section 139.031 R.S.Mo.

Plaintiffs' claims were dismissed for not being timely filed, except to the extent claims were properly lodged and preserved pursuant to the provisions of Section 139.031, R.S.Mo. The property tax refund claims timely lodged were dismissed for insufficient specificity.[1] Substantively, the Circuit Court found that Amendment No. 2 authorized Defendant School District to adopt an operating tax

[1] App. L.F. at 042

levy of up to $2.75 without voter approval, and ordered all claims set forth in the Petition stricken and dismissed.[2]

The Circuit Court's findings that Appellants' claims were not timely filed is based on reasoning involving the construction of Sections 22 and 23 of Article X, together with Sections 137.073, 139.031 and 163.031 R.S.Mo, (2000). The dismissals based upon the finding that Proposition No. 2 permitted Defendant School District to raise its operating tax levy rate to $2.75 without a vote involves the construction of Sections 11, 22, and 23 of Article X, as well as Chapter 163 R.S.Mo.

The Circuit Court entered Judgment on April 8, 2002.[3] A Notice of Appeal was timely filed on May 16, 2002 initiating the appeal before the Supreme Court of Missouri, No. SC084516.[4] On August 8, 2002 This Court transferred this cause to the Court of Appeals, Western District.

The Court of Appeals entered an Opinion of February 18, 2003 affirming in part, reversing in part, and remanding the action to the circuit court. This Court on May 27, 2003 Ordered Transfer of this cause back from the Court of Appeals.

This Court has exclusive jurisdiction of the appeal pursuant to Section 3 of Article of the Missouri Constitution in that questions not previously determined by

---

[2] App. L.F. at 042

[3] App. L.F. at 041

[4] App. L.F. at 044

this Court involving the construction of Missouri revenue laws, Sections 11, 22, and 23 of Article X of the Missouri Constitution, and Section 139.031 R.S.Mo are raised. Exclusive jurisdiction lies here also as questions concerning the validity of Sections 11 and 22(a) of Article X of the Missouri Constitution are raised. Additionally This Court has jurisdiction pursuant to its grant of Transfer.

STATEMENT OF FACTS

Introduction

Since 1980, when the voters approved the "Hancock Amendment," Section 22(a) of Article X to the Missouri Constitution (referred to herein as "Section 22") has imposed upon Defendant School District a maximum authorized current levy, commonly referred to as a "ceiling" or "lid" on authorized local property tax revenues (see Appendix at A18). In determining a School's maximum authorized current levy, Section 22 takes prior year assessed valuation as a tax base, and compares the current year's valuation growth and the growth in the price level. If tax base valuation grows at a rate greater than the price level, the School is required by Section 22 to reduce its maximum authorized current levy to yield the same revenue from the tax base, adjusted for changes in the price level, as could have been collected at the existing levy on the tax base.[5]

[5] App. L.F. at 006

In 1998 the voters approved "Amendment 2," first effective in the 1999 tax year[6], an amendment to Sections 11(b) and 11(c) of Article X of the Missouri Constitution (referred to herein as "Section 11") (see Appendix at A17). Section 11 was entitled "Limitations on local tax rates." As in effect between 1942 and 1998, Section 11(b) limited Defendant School District to a maximum $1.25 levy rate, unless the voters approved a higher levy pursuant to Section 11(c). The 1998 amendment changed the Section 11(b) School levy limit to $2.75, The 1998 amendment also changed the voting requirements to obtain a School levy rate higher than $2.75. Before and after passage of Amendment 2, Section 11 provided its tax rate ceilings may be further limited by other law.

Procedural History

Plaintiffs filed their Petition on January 14, 2002.[7] The Petition alleged that Defendant School District for the tax years 1999, 2000, and 2001 had interpreted Section 11 as allowing it to raise its levy rate to $2.75 without voter approval, even though $2.75 was in excess of its maximum authorized current levy under Section 22.[8] The Petition further alleged that for 2001, a biennial reassessment year, assessed valuation had increased 16%, but that the price level

[6] App. L.F. at 007

[7] App .L.F. at 001, 004

[8] App. L.F. at 007

had only increased 3.3%, and that Section 22 required a reduction of the $2.75 levy below the $2.75 level.[9]

The Petition alleged that the School District interpreted Section 11 to allow it to leave its levy rate at $2.75 without the necessity of voter approval, even if changes in valuation and inflation under Section 22 would otherwise require a "rollback," or reduction of the maximum authorized current levy.[10]

Count I sought declaratory judgment as to an interpretational conflict between Section 11 and Section 22.[11] Count I was encaptioned as follows:

> **"Declaratory Judgment as to whether Amendment 2 Authorized Levy Rate Increases up to $2.75 without the Necessity of an Affirmative Vote"**

Declaration was sought as to whether Section 11 allowed the School to increase its levy to $2.75, which was in excess of the maximum authorized current levy, without voter approval, and a determination of the maximum authorized 2001 tax rate allowed by Section 22.[12]

Count II sought declaration as to another interpretational conflict between Section 11 and Section 22.[13] Count II was encaptioned:

---

[9] App. L.F. at 008

[10] App L.F. 006-009

[11] App. L.F. at 009

[12] App. L.F. at 009-010

[13] App. L.F. at 010

"Declaratory Judgment as to whether Amendment 2 Negates the Applicability of Section 22 of Article 10 when Valuation Growth Exceeds Inflation Growth"

Count II requested that, assuming the School District's lawful levy rate in 2000 was $2.75, a determination be made as to whether Section 11 nullified or negated the "rollback" requirement of Section 22 for Schools with levy rates of $2.75 or less.[14] This Count alleged that in 2001 valuation growth had outstripped inflation growth, and Section 22 required a levy rate reduction below the $2.75 rate the School levied for 2001.[15] Citing the School's determination that Section 11 allowed it to continue to levy $2.75 regardless of the Section 22 reduction requirement, Count II asked for declaration that Section 11 did not negate or nullify Section 22, and that in 2001 the School was required by Section 22 to reduce its levy below $2.75.[16]

Count III pleaded that Defendant School District had in part refused to reduce its 2001 levy rate below $2.75 based upon its determination that such a reduction would cause it to suffer reduced or lost state financial aid.[17] As a result of this determination, the School had set Plaintiffs' tax rate at a level that was

[14] App. L.F. at 010-012

[15] App. L.F. at 010-012

[16] App. L.F. at 010-012

[17] App. L.F. at 012

higher than the School would have set if it had known it would not lose state aid, causing pecuniary harm to Plaintiffs. Count III was encaptioned:

> **"Declaratory Judgment as to whether Chapter 163 R.S.Mo requires Loss or Reduction in State Aid when Section 22 of Article 10 requires a Levy Reduction"**

Count III requested the declaration that, if in 2001 Section 22 was still operable to require a levy reduction below $2.75, the School would not lose Chapter 163 R.S.Mo State Financial Aid.[18] (see Appendix at A22) The state aid statutes require a minimum levy of $2.75, but contain savings provisions prohibiting reduced state aid when Section 22 causes levy rate reductions to levels below $2.75.[19] This Count requested a declaration protective of School revenues, which was also protective of property taxpayers.[20] The Attorney General was named as a Defendant to represent the state's interest in Count III.[21]

Count IV was suit for refund of 2001 property taxes paid under protest pursuant to Section 139.031 R.S.Mo.[22] (see Appendix A19) This suit for refund was commenced on January 14, 2002.[23] Accepting the allegations of this Count as

---

[18] App. L.F. at 012-014

[19] App. L.F. at 012-014

[20] App. L.F.at 012-014

[21] App. L.F. at 004

[22] App. L.F. at 014

[23] App. L.F. at 004

being true, Appellant Taxpayers paid their 2001 property taxes to Respondent Collector Hunter under protest pursuant to Section 139.031 R.S.Mo[24] on the ground that the School District's tax rate was in excess of that permitted by Section 22 of Article X of the Missouri Constitution.[25]

Count V was a request for award of attorney's fees authorized by the Hancock Amendment for successful enforcement or interpretation of that amendment.[26]

Defendant School filed Motions to Dismiss and to Strike various aspects of the Petition on March 13, 2002, fifty-six days after having been served.[27] Defendant did not file an Answer.[28] Defendants did not file any motion for summary judgment, or motion for judgment on the pleadings.[29] Plaintiffs filed an Objection and Motion to Strike Defendant's Motions as being untimely as the School was in default, and said default had not been set aside.[30]

---

[24] App. L.F. at 005

[25] App. L.F. at 014

[26] App. L.F. at 015

[27] App. L.F. at 001, 020-037

[28] App. L.F. 001-003

[29] App. L.F. 001-003

[30] App. L.F. at 041-043

On April 8, 2002, the Circuit Court entered Judgment.[31] (see Appendix at A1) The Plaintiffs' Objection and Motion were overruled, and Defendant was allowed to file its motions out of time.[32] The Circuit Court then held that all claims of the Plaintiffs set forth in their Petition against the Defendants were dismissed.[33] The Circuit Court dismissed and struck Plaintiffs' Petition on the grounds that (1) it was untimely as not being commenced prior to December 31, 2001, and (2) it was insufficiently pleaded, and (3) that as a matter of law Amendment 2 allowed the School to raise its levy to $2.75 without voter approval under Hancock.[34] The Attorney General's motion to dismiss was sustained.[35]

Appellants timely filed their Notice of Appeal on May 16, 2002.[36] The appeal was initially lodged with the Supreme Court, but it was transferred to the Court of Appeals.

On February 18, 2003, the Western District Missouri Court of Appeals issued an Opinion affirming in part, and reversing in part, the Circuit Court (see Appendix at A4). The Court of Appeals denied Appellants point with respect to

---

[31] See also App. L.F. at 002, 041

[32] App. L.F. at 041

[33] App. L.F. at 043

[34] App. L.F. at 041-043

[35] App. L.F. at 002

[36] App. L.F. at 044

the timeliness of the filing of Count IV seeking refund of 2001 taxes pursuant to Section 139.031 R.S.Mo holding that the Circuit Court had not dismissed this Count on the basis timeliness. The Opinion indicated that Count IV, filed within the period prescribed by Section 139.031, was timely filed.

With respect to Appellants point that they had adequately pleaded a cause of action under Section 139.031 R.S.Mo, the Opinion held that the Count was sufficiently pleaded, and that the Circuit Court erred in treating this matter as a motion to dismiss as opposed to a motion for more definite statement.

With respect to declaratory judgment Counts I and II, the Opinion held that the circuit court erred in addressing the merits of Section 11 by motions to strike and to dismiss. The Opinion also disagreed with the School District's contentions that these counts were barred by sovereign immunity, and that the actions were untimely as not filed prior to December 31 of the 2001 tax year.

Finally, the Opinion upheld the Circuit Court's dismissal of Count III on the ground taxpayers had no standing to litigate the question of whether a levy reduction below $2.75 required by Section 22 would result in a loss of state financial aid to the School District.

After the Court of Appeals denied rehearing and transfer motions of the School District, the School applied to this Court for transfer. The grounds stated in the School's Application included:

a. the general interest and importance of the question of whether Section 11 (1998 Amendment 2) authorized School Districts to adopt a $2.75 levy

without obtaining voter approval, and/or whether Section 11 prevails over Section 22(a) of Article X (the Hancock Amendment).

b. the Court of Appeals Opinion was contrary to Supreme Court precedent as to the timeliness of declaratory judgment actions involving Hancock issues.

This Court granted transfer by Order of May 27, 2003.

POINTS RELIED ON

I. The Circuit Court erred in dismissing Declaratory Judgment Counts I, II, and III of Appellant taxpayers' Petition, seeking construction of Sections 11 and 22(a) of Article X of the Missouri Constitution, and seeking construction of Section 22(a) with state financial aid statutes contained in Chapter 163 R.S.Mo, by making the substantive determination that Section 11, Article X of the Missouri Constitution authorized defendants to establish a $2.75 levy without voter approval, because the court in considering a motion to dismiss is limited to determining whether the allegations in the petition are sufficient to state a claim, in that the Circuit Court exceeded its role by reaching the merits of the taxpayers' claims in ruling on motion to dismiss, thereby depriving the taxpayers of the opportunity to present evidence and law in support of these counts.

II. The Circuit Court erred in dismissing Declaratory Judgment Counts I, II, and III of taxpayers' Petition on the ground that they were "claims with respect to the property taxes for the 1999 and 2000 tax years" and were

untimely as "not asserted until after those taxes became due and payable," because the Circuit Court misinterpreted the nature of the 1999 and 2000 allegations, and erroneously applied precedent pertaining to Constitutional refund claims, in that these allegations constituted the basis for the Declaratory Judgment Counts, not separate refund claims for the 1999 and 2000 years, and were timely filed.

III. The Circuit Court erred in dismissing Declaratory Judgment Counts I, II, and III of Appellant taxpayers' Petition, seeking interpretations of Sections 11 and 22(a) of Article X of the Missouri Constitution with one another, and seeking interpretation of Section 22(a) with state financial aid provided pursuant to Chapter 163 R.S.Mo, on the substantive ground that Section 11 of Article X of the Missouri Constitution authorized defendants to establish a $2.75 levy without voter approval, because this substantive determination erroneously applied the law in that:

A. The Adoption of Amendment 2 Amending Section 11 of Article X in 1998 did not authorize Respondent School District to increase its tax levy rate to $2.75, which was higher than its maximum authorized current levy allowed under Section 22(a) of Article X, without voter approval therefore, and Count I should have been substantively determined in favor of Appellants.

B. Assuming Respondent School District's 2000 maximum authorized current levy rate was $2.75, in 2001 when total assessed valuation growth exceeded the rate of growth in the price index, Section 22(a) of Article X required the levy rate to be reduced, because Section 11 of Article X did not authorize the levy rate to be left at $2.75 without voter approval, and Count II should have been substantively determined in favor of Appellants.

C. If Respondent School District in 2001 had reduced its levy below $2.75 pursuant to the requirements of Section 22(a) of Article X, it would not have been subject to reduced or lost state financial aid provided pursuant to Chapter 163 R.S.Mo, and Appellant taxpayers had standing to pursue this declaratory judgment, because the School District's interpretation that it would lose state aid resulted in direct pecuniary injury to Plaintiffs in the form of a tax rate higher than permitted by Section 22(a) of Article X, and Count III should have been substantively determined in favor of Appellants.

IV. The Circuit Court erred in dismissing Count IV of the taxpayers' Petition, seeking a refund of taxes paid under protest pursuant to Section 139.031 R.S.Mo, for failure to state a claim with sufficient specificity because, the allegations of the Petition that total assessed valuation of property in the School District grew 16% while the general price level grew 3.3% between 2000 and 2001, that the School District's levy rate remained the same from 2000 to 2001, that the School District's 2001 tax rate was unlawfully high in

violation of Section 22(a), Article X of the Missouri Constitution, that Appellant taxpayers paid their 2001 taxes under protest pursuant to Section 139.031 R.S.Mo, that they were suing for a refund pursuant to Section 139.031 R.S.Mo, were sufficient to state a claim upon which relief could be granted.

V. The Circuit Court erred in dismissing Count V of Appellants' Petition, seeking an award of attorneys fees and costs for successful enforcement of Section 22 of Article X of the Missouri Constitution pursuant to Section 23 of Article X, on the ground that, under the allegations of the Petition Appellants were not entitled to such recovery, because Section 23, Article X of the Missouri Constitution provides that a taxpayer is entitled to costs, including reasonable attorneys' fees, if he successfully brings suit to enforce the provisions of Sections 16-22 of Article X in that the basis of the taxpayers' lawsuit is the enforcement of Section 22 of Article X, as set forth above in Points I, II, III, and IV, and if the taxpayers are successful, Section 23 of Article X entitled them to attorneys' fees and costs.

ARGUMENT

I. The Circuit Court erred in dismissing Declaratory Judgment Counts I, II, and III of Appellant taxpayers' Petition, seeking construction of Sections 11 and 22(a) of Article X of the Missouri Constitution, and seeking

construction of Section 22(a) with state financial aid statutes contained in Chapter 163 R.S.Mo, by making the substantive determination that Section 11, Article X of the Missouri Constitution authorized defendants to establish a $2.75 levy without voter approval, because the court in considering a motion to dismiss is limited to determining whether the allegations in the petition are sufficient to state a claim, in that the Circuit Court exceeded its role by reaching the merits of the taxpayers' claims in ruling on motion to dismiss, thereby depriving the taxpayers of the opportunity to present evidence and law in support of these counts.

Standard of Review

"In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the following standard of review applies:

> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences there from. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case."

Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462, 464 (Mo. 2001).

In *Irvin v. Missouri Bd. of Probation and Parole,* 34 S.W.3d 202, 03 (Mo. App. W.D. 2000), the court of appeals stated this standard of review should be applied to any petition which, if provided, entitles the pleader to a declaration of rights or status.

Argument

Count IV of Plaintiffs' Petition contained the fundamental remedy requested in the lawsuit: a refund or credit of taxes paid pursuant to a tax rate allegedly in violation of Section 22(a) of Article X of the Missouri Constitution.[37]

Ancillary to Count IV, Counts I, II, and III sought declarations as to whether 1998 Amendment 2, amending Section 11 of Article X, authorized Defendant School District to raise its levy to $2.75, above the maximum authorized current levy limit of Section 22(a) without voter approval, whether Amendment 2 exempts Schools from the Section 22(a) requirement of levy rollbacks when valuation growth exceeds inflation growth, and whether a levy rollback below $2.75 in compliance with Section 22(a) triggers loss of state financial aid to the School.

After hearing arguments related to Defendant School District's "Motion to Dismiss . . . Or In The Alternative, Strike Plaintiffs' Requests for Declarations,"[38] the circuit court entered judgment dismissing and striking all counts in the

[37] App. L.F. at 014

[38] App. L.F. at 020-033.

petition.[39] Instead of ruling on the sufficiency of the counts as plead, the circuit court decided the claims were untimely filed[40] and further made the substantive determination that Amendment No. 2, by its enactment, authorized the School District to raise the levy without voter approval.[41] No motion for judgment on the pleadings or summary judgment was before the court at that time.[42]

The Circuit Court failed to apply the correct legal review pertaining to a motion to dismiss. In the absence of an Answer from Defendants, discovery from any of the parties, testimony, evidence, or other basic indicia of procedural compliance and fairness, a ruling on the merits of the case is premature. *See Nicolai v. City of St. Louis*, 762 S.W.2d 423, 425 (Mo. banc 1988) (where construction of statutes and Missouri Constitution is required for resolution, dismissal for failure to state a claim is improper).

Instead of properly reviewing the sufficiency of the Petition, the Circuit Court ruled that as a matter of law Amendment No. 2 allowed the School to raise its levy to $2.75 without voter approval.[43] Thus the Circuit Court reached the merits of Counts I, II, and III after finding the taxpayers did not state causes of

---

[39] App. L.F. at 041-043

[40] Appellants further discuss this issue of timeliness in Point Relied on II, infra.

[41] App. L.F. at 042.

[42] App. L.F. at 001-003

[43] Paragraph 4 of the Judgment, L.F. 042.

action for a declaratory judgment on those Counts. As the Court of Appeals noted:

> "In reaching this conclusion, the Circuit Court necessarily resolved the controversy on its merits. It dismissed the petition, not because it did not aver facts that, if proven, state a cause of action, but because Section 11 (b) "authorized the School District to adopt an operating levy of up to $2.75 without voter approval." Thus, in justifying the dismissal, the circuit court reached the merits of the issue and made what appears to be the declaration that it, in the same sentence, ruled that the taxpayers could not have. This is procedurally inconsistent and an improper basis for the dismissal of a declaratory judgment action." (see Appendix at A10)

In making this ruling at the motion to dismiss stage, the Circuit Court deprived Appellants of the opportunity to obtain and present evidence and law in support of their claims through the litigation process. Also, because no request for summary judgment with opportunity to respond was afforded, Appellants had no opportunity to brief the issues and provide legal argument with respect to the legal issues presented.

Counts I, II, and III presented valid issues as to the construction of the constitution and statutes. They set forth legitimate separate legal issues that deserved separate consideration and decision. Decisions on each separate question will benefit Appellant taxpayers and Respondent School District by precluding the need to re-litigate these questions every tax year. As the courts

have recognized these are the salutary purposes underlying the declaratory judgment remedy, for which purposes the remedy should be available. *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 425 (Mo. banc 1988); *King Louie Bowling Corp. v. Missouri Guarantee Insurance Association*, 735 S.W.2d 35, 38 (Mo. App. 1987); *City of Creve Coeur v. Creve Coeur Fire Protection District*, 355 S.W.2d 857, 859 (Mo. 1962). The availability of declaratory judgments seeking interpretation of rights under the Hancock Amendment has been specifically affirmed by This Court. See *Roberts v. McNary*, 636 S.W.2d 332, 337 (Mo. banc 1982); *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 12 (Mo. banc 1981).

Relief Requested

Plaintiffs request reversal of the Circuit Court's dismissal of Counts I through III for failure to state a claim.

II. The Circuit Court erred in dismissing Declaratory Judgment Counts I, II, and III of taxpayers' Petition on the ground that they were "claims with respect to the property taxes for the 1999 and 2000 tax years" and were untimely as "not asserted until after those taxes became due and payable", because the Circuit Court misinterpreted the nature of the 1999 and 2000 allegations, and erroneously applied precedent pertaining to Constitutional refund claims, in that these allegations constituted the basis for the Declaratory Judgment Counts, not separate refund claims for the 1999 and 2000 years, and were timely filed.

Standard of Review

Appellate courts give no deference to inferior courts on questions of law.[44] When reviewing the decision of a lower court that erroneously applied or interpreted the law, the reviewing court uses its own independent judgment.[45] This court is therefore not bound by the legal conclusions of the lower courts, and declares the law on its own authority. "The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied."[46]

Argument

The Circuit Court held that, at the time of the filing of the Petition, January 14, 2002, it was too late for the Plaintiffs to assert "claims" with respect to the property taxes for the 1999 and 2000 tax years. The Circuit Court cited precedent

---

[44] *MFA Mut. Ins. Co. v. Home Mut. Ins. Co.*, 629 S.W.2d 447, 450 (Mo. App. 1982).

[45] *All Star Amusement, Inc. v. Director of Revenue,* 873 S.W.2d 843, 844 (Mo. 1994). *Dial v. Lathrop R-II School Dist.*, 871 S.W.2d 444, 446 (Mo. 1994). *House of Lloyd, Inc. v. Director of Revenue, State of Mo.*, 824 S.W.2d 914, 916 (Mo. 1992). *City of Cabool v. Missouri State Bd. of Mediation*, 689 S.W.2d 51, 54 (Mo. 1985).

[46] *State v. Plastec, Inc.*, 980 S.W.2d 152, 155 (Mo. App. E.D. 1998).

involving construction of the constitutional remedies afforded under Section 23 of Article X of the Constitution. (see Appendix at A1, paragraph 2)

The allegations of the petition pertaining to 1999 and 2000 were allegations as to the tax base valuation, the growth of the tax base valuation, the changes in the price level, the levy rates set by the School, and the refusal of the School to reduce its levy below $2.75 for fear of losing state financial aid. These allegations were necessary to present the basis for the Count I request for declaration that Amendment 2 did not authorize Respondent School District to levy $2.75 without voter approval. These allegations were necessary to present the basis for the Count II request for declaration that Section 22 required Respondent School District to "roll back" or reduce its levy below $2.75. These allegations were necessary to present the basis for the Count III request for declaration that Respondent School District would not lose state aid by complying with Section 22.

It is apparent the Circuit Court mistook these allegations as separate claims for *refunds* of prior tax years 1999 and 2000. That is simply not the case, as the only count seeking refunds, Count IV, is limited to requesting refunds only for the 2001 tax year. Declaratory Judgment Counts I, II, and III are properly brought in aid of their timely statutory refund count of Count IV for 2001.

Declaratory Judgment to interpret Section 22 is specifically authorized by Section 23 of Article X. This Court has recognized that Section 23 "gives taxpayers standing to bring 'actions for interpretation' of the Hancock

Amendment." *Green v. Lebanon R-III School District*, 13 S.W.3d 278, 281 (Mo. 2000). The declaratory judgment claims are 'actions for interpretation' of the Hancock Amendment. The taxpayers' claims allege that the Hancock Amendment is not being adhered to or enforced by Respondents. Where it has been alleged that the Hancock Amendment has not been enforced according to its terms, there is a justiciable controversy ripe for adjudication and thus a declaratory judgment action is available. See *Roberts v. McNary*, 636 S.W.2d 332, 337 (Mo. banc 1982); *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 12 (Mo. banc 1981).

Section 139.031.2 R.S.Mo provides that the statutory tax refund action is timely commenced if the protesting taxpayer commences the action for refund of the amounts protested "within ninety days after filing his protest." This statute contemplates that tax refund actions will be filed after December 31. This action was timely filed on January 14, 2002. The February 18, 2003 Court of Appeals Opinion observed:

> "We certainly concur with the taxpayers that a § 139.031 claim is not necessarily untimely merely because it is not filed by December 31 of a given tax year. Each year, the tax book with the year's tax rates are not due for delivery to the county collector until October 31, the point at which the tax rates for the current year become official. Section 137.290; *Green v Lebanon R-III School District*, 13 S.W.3d 278, 287 (Mo banc 2000) (Wolff, J., concurring). Even were the tax bills issued and the taxes instantaneously paid under protest upon delivery of the tax book, taxpayers,

> depending on the circumstances, could have as few as 60 days remaining before year's end in which to file their § 139.031 refund action—not the 90 days that the General Assembly mandated in § 139.031.2 that a taxpayer is to have to file a refund action after paying under protest. The General Assembly obviously authorized refund actions that commenced *after* December 31 but within 90 days of paying under protest. ....
>
> Indeed, while the *Koehr* court directed the circuit court to dismiss all claims for declaratory relief and refunds of taxes brought on behalf of a class of taxpayers who filed suit on March 11, 1998, it allowed the individual claims of a taxpayer concerning 1997 taxes because, although not filed until after December 31, the action was timely in that it was brought within 90 days of having paid the taxes under protest as provided by Section 139.031. 55 S.W.3d at 861-64.
>
> We have found no case holding otherwise, and the school district does not direct us to any. Requiring taxpayers to file a declaratory judgment action by December 31, when we have already determined that the Section 139.031 action on which the refund is based can be filed within 90 days after paying taxes under protest, would be absurd." (see Appendix at A7 and A13)

The Circuit Court's reliance on precedent interpreting the timeliness of the constitutional Hancock Amendment ***refund*** remedy was misplaced. Article X, § 23 of the Missouri Constitution provides:

> **"Section 23. Taxpayers may bring actions for interpretations of limits.—**Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county, or political subdivision shall have standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article ..."

Section 23 has been interpreted by the Supreme Court to provide both a declaratory judgment remedy as well as a refund remedy. However the constitutional refund remedy is independent and separate from the statutory provided by Section 139.031 R.S.Mo. Count IV sought enforcement of that statutory refund remedy, and was timely brought within 90 days of paying the taxes under protest.

The Circuit Court's citation to Judge Wolff's concurring opinion in *Green v. Lebanon R-III School District*, 13 S.W.3d 278 (Mo. banc 2000), and its progeny, for the proposition that these declaratory judgment counts were untimely is not a correct interpretation of that precedent. In *Green*, Judge Wolff saw the issue there as:

> "To be eligible for tax refunds, the taxpayers' lawsuits must be timely filed under the statutory scheme. The issue of timeliness—and hence of eligibility for refunds—is a major issue left open by the principal opinion, and the parties, to be addressed after these cases are remanded to the trial

court. Whether taxpayers have a remedy for refunds is dependent upon statute, not on the constitution."

In his concurrence, Judge Wolff noted that Section 23, by its own terms, "gives taxpayers standing to bring 'actions for interpretation' of the Hancock Amendment." *Id.* at 287. Even were Judge Wolff's concurrence applicable to this case, the conclusion to be drawn therefrom is that compliance with the statutory prerequisites for refund is required. Thus Appellants actions for declaratory judgment and refund claims were timely filed if initiated within 90 days of protest.[47]

It is noted that Judge Wolff's conclusions that the Section 23 constitutional remedy is determined by statute, and that the refund remedy must be initiated before December 31 of the tax year, contradict precedent found in *Ring v. Metropolitan St. Louis Sewer Dist*., 969 S.W.2d 718, 718-19 (Mo. banc 1998)**,** and in *City of Hazelwood v. Peterson*, 48 S.W.3d 36 (Mo. banc 2001), the latter of which was concurred in by Judge Wolff. *Ring* held that the constitutional refund remedy was independent of, and unfettered by, statutory remedy limitations, and that the remedy included a timely action for refund of taxes *previously paid*. Taxes are timely paid on December 31, so *Ring* appears to contemplate a timely

---

[47] Appellants stated in their Petition that they complied with Section 139.031. Pursuant to the applicable standard of review, this Court is required to accept this allegation as true.

Hancock action being filed after December 31. *Hazelwood* upheld the recovery of refunds in an action instituted after December 31.

Clearly, Appellants did timely assert their claims – the claim in Count IV for statutory refund as well as the declaratory judgment counts, Counts I, II, and III. The circuit court erred in applying the wrong law to these counts.

Relief Requested

Plaintiffs request reversal of the dismissal of Counts I, II, and III.

III. The Circuit Court erred in dismissing Declaratory Judgment Counts I, II, and III of Appellant taxpayers' Petition, seeking interpretations of Sections 11 and 22(a) of Article X of the Missouri Constitution with one another, and seeking interpretation of Section 22(a) with state financial aid provided pursuant to Chapter 163 R.S.Mo, on the substantive ground that Section 11 of Article X of the Missouri Constitution authorized defendants to establish a $2.75 levy without voter approval, because this substantive determination erroneously applied the law in that:

A. The Adoption of Amendment 2 Amending Section 11 of Article X in 1998 did not authorize Respondent School District to increase its tax levy rate to $2.75, which was higher than its maximum authorized current levy allowed under Section 22(a) of Article X, without voter approval therefore, and Count I should have been substantively determined in favor of Appellants.

B. Assuming Respondent School District's 2000 maximum authorized current levy rate was $2.75, in 2001 when total assessed valuation growth exceeded the rate of growth in the price index, Section 22(a) of Article X required the levy rate to be reduced, because Section 11 of Article X did not authorize the levy rate to be left at $2.75 without voter approval, and Count II should have been substantively determined in favor of Appellants.

C. If Respondent School District in 2001 had reduced its levy below $2.75 pursuant to the requirements of Section 22(a) of Article X, it would not have been subject to reduced or lost state financial aid provided pursuant to Chapter 163 R.S.Mo, and Appellant taxpayers had standing to pursue this declaratory judgment, because the School District's interpretation that it would lose state aid resulted in direct pecuniary injury to Plaintiffs in the form of a tax rate higher than permitted by Section 22(a) of Article X, and Count III should have been substantively determined in favor of Appellants.

Standard of Review

Appellate courts give no deference to inferior courts on questions of law. *MFA Mut. Ins. Co. v. Home Mut. Ins. Co.*, 629 S.W.2d 447, 450 (Mo. App. 1982). When reviewing the decision of a lower court that erroneously applied or interpreted the law, the reviewing court uses its own independent judgment. *All Star Amusement, Inc. v. Director of Revenue,* 873 S.W.2d 843, 844 (Mo. 1994). *Dial v. Lathrop R-II School Dist.*, 871 S.W.2d 444, 446 (Mo. 1994). *House of Lloyd, Inc. v. Director of Revenue, State of Mo.,* 824 S.W.2d 914, 916 (Mo. 1992).

City of Cabool v. Missouri State Bd. of Mediation, 689 S.W.2d 51, 54 (Mo. 1985). This court is therefore not bound by the legal conclusions of the lower courts, and declares the law on its own authority.

Where constitutional provisions are clear and unambiguous, courts will apply such meaning and not engage in construction based on intent. *Hazelwood v. Peterson*, 48 S.W. 3rd 647 (Mo banc 2002).

In construing constitutional provisions, the fundamental aim is to give effect to the intent of the people in adopting the amendment and resolve seemingly conflicting provisions by harmonizing those provisions." *Barnes v. Bailey*, 706 S.W.2d 25, 28 (Mo. 1986). A constitutional provision is "interpreted according to the intent of the voters who adopted it." *Conservation Federation of Missouri v. Hanson*, 994 S.W.2d 27, 30 (Mo. 1999).

Constitutional amendments are adopted by the voters of this state, and must be interpreted in accordance with the voters' intent. Furthermore, courts will attempt to harmonize seemingly incompatible amendments if at all possible. *Conservation Federation of Mo. v. Hanson,* 994 S.W.2d 27, 30 (Mo. 1999). *Keller v. Marion County Ambulance Dist.,* 820 S.W.2d 301, 302 (Mo. 1991). *State ex rel. Upchurch v. Blunt,* 810 S.W.2d 515, 516 (Mo. 1991). All related provisions must be examined in context as parts of a whole, and must be reconciled unless completely contradictory. *Barnes v. Bailey,* 706 S.W.2d 25, 28-29 (Mo. 1986). *Roberts v. McNary,* 636 S.W.2d 332, 335 (Mo. 1982).

Generally, where two different tax provisions of the Constitution are *in pari materia* they should be construed together. As both Amendment 2 and the Hancock Amendment deal with tax limitations, they deal with the same subject. Courts must seek to harmonize such laws, even though enacted at different times and found in different places. See *State ex rel Goldberg v. Barber & Sons Tobacco, Inc.*, 649 S.W.2d 859, 861 (Mo. 1983); *ITT Canteen Corp. v. Spradling*, 526 S.W.2d 11, 16 (Mo. 1975).

Implicit repeal of constitutional provision is looked upon with great disfavor in the law. *State ex rel. Gordon v. Becker*, 49 S.W.2d 146, 147 (Mo. 1932).

Argument

A. The Adoption of Amendment 2 Amending Section 11 of Article X in 1998 did not authorize Respondent School District to increase its tax levy rate to $2.75, which was higher than its maximum authorized current levy allowed under Section 22(a) of Article X, without voter approval therefore, and Count I should have been substantively determined in favor of Appellants.

Amendment 2 set a new tax *rate* limit. It did not modify Section 22(a) of the Hancock Amendment, which established a *revenue* limit. What is potentially confusing is that the mechanism Section 22(a) utilizes to establish its revenue limit is also a tax rate—the political subdivision's maximum authorized current levy. However, when the language of Section 11 is read it is apparent on its face that it

was not intended to negate or nullify the provisions of Section 22(a). There is no inconsistency or issue presented requiring any construction such as the Circuit Court engaged in. There is simply no basis for the Circuit Court's conclusion that Amendment 2 authorized the School to set its tax rate to $2.75 when such rate was in excess of its maximum authorized current levy limitation of Section 22(a).

Hancock Amendment

In 1980, the Missouri Constitution was amended to limit state and local government's power to tax in a provision known as the Hancock Amendment. The purpose of the Hancock Amendment was to rein in increases in governmental revenue and expenditures. *Roberts v. McNary*, 636 S.W.2d 332, 336 (Mo. banc 1982). "Read as a whole, the Hancock Amendment, Mo. Const. art X, §§16-24, aspires to erect a comprehensive, constitutionally-rooted shield erected to protect taxpayers from government's ability to increase the tax burden above that borne by the taxpayers on November 4, 1980." *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995).

"Whatever one wishes to say about the Hancock Amendment, this much is clear: it no longer blithely trusts the ability of the elected representatives of the government to manage the government's fiscal affairs. Prior to the adoption of the Hancock Amendment, the people had given their elected representatives carte blanche authority to raise taxes. The Hancock Amendment revokes that consent and establishes a presumption that government has taken enough from the

taxpayers and, as to local government, forbids the government from reaching any deeper into their pocketbooks without the taxpayers' express approval *in advance*. Because of its basic distrust of government, it is unlike any other provision of the constitution or the statutes. Therefore, the remedy the amendment admits—a taxpayer suit—must hang like the bloody blade of the guillotine over the Reign of Terror—a constant, deterring reminder of the fate that awaits rulers who ignore the will of the people." *Beatty v. St. Louis Sewer Dist.*, 914 S.W.2d 791, 798 (Mo. banc 1995). (Justice Robertson's concurring opinion)

For local government including school districts, Section 22(a) of the Hancock Amendment provided a limitation on the amount of tax *revenue* local taxing authorities can receive in a given year. Unless a higher tax rate is approved by voters, Section 22(a) limits the tax revenue in a given year to the amount of revenue received in the immediately preceding year, plus an allowance for new construction and a cost-of-living increase. This limitation is stated in the Constitution as follows:

"If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value."

Mo. Const. Art. X, § 22(a) (see Appendix at A18).

Local property tax revenue is based on the following formula: Revenue = (tax rate) X (assessed property value). When property values go up, the tax rate must be reduced to achieve the same amount of revenue as when property values were lower. Accordingly, although the Hancock Amendment is expressed as a tax *revenue* limitation, the means to achieve the appropriate revenue amount is to adjust the tax rate when appraised values in a given year change. The "maximum authorized current levy" is that levy that produces the revenues above which the School cannot go without voter approval.

Amendment 2

Amendment 2 revised a provision of the Missouri Constitution, Art. X §11, that had been in effect since 1875 for the purpose of limiting county government expense. *State ex rel. Hirni v. Missouri Pacific Railway Company*, 27 S.W.367, 369-70 (Mo. 1894). The effect of Amendment 2 is well articulated in Point I of the Brief of Amici Curae filed by Bryan Cave LLP, on behalf of Associated Industries of Missouri and Missouri Chamber of Commerce & Industry, which Appellants anticipate will be filed in this matter and in which Appellants concur.

Before Amendment 2 was adopted, Section 11(b) provided, in relevant part:

> "Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

> …For school districts formed of cities and towns, including the school district of the City of St. Louis—one dollar and twenty-five cents on the hundred dollars assessed valuation."

Amendment 2 raised that ceiling to $2.75.

Before Amendment 2, Section 11(c) provided, in relevant part, the manner in which school districts could increase their levy rates:

> "provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified **and not to exceed one year,** except as herein provided, **when the rate period of levy and the purpose of the increase are submitted to a vote** and a majority of the qualified electors voting thereon shall vote therefor[.]"

Amendment 2 revised Section 11(c) in the following manner to now read:

> "provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed [three times the limit herein specified and not to exceed one year] **six dollars on the hundred dollars assessed valuation**, except as herein provided, when the rate [period of levy] and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor[.]"

Following Amendment 2, with respect to school districts, Section 11 now omits the requirement of setting forth the specific purpose for the tax levy increase (under Section 11(b)) and the time period for which a levy increase would be permitted for rates up to $2.75. Amendment 2 still requires the school districts to submit the purpose to the voters for any levy rate increase above $2.75.

Importantly, Amendment 2 did not change that portion of Art. X, §11(c) which provides that "the rates herein fixed, and the amounts by which they may be increased may be ***further limited by law***."

A tax rate increase under Art. X, §11 ***is further limited by Art. X, §22*** which requires voter approval of a tax levy rate increase when the School District's maximum authorized current levy is lower than the $2.75 ceiling in Art. X, §11(b). The tax rate ceiling in Section 11(b) was further limited by Section 22(a) before Amendment 2, and there is no language in Art. X, §11 that plainly dispenses with this requirement. Art. X, §11 clearly contemplates *further limits by other law* to the tax rate ceiling in §11(b).

Respondent School District contends, and the judgment indicates the Circuit Court accepted this contention, that after enactment of Amendment 2, a School District with a maximum authorized current levy of less than $2.75 is exempted from the Hancock Amendment, and does not need voter approval to set its levy at $2.75. This contention asks taxpayers, and This Court, to view Amendment 2 as repealing the constitutional *revenue* limit for schools with maximum authorized current levies of less than $2.75.

There is no support for the notion that Amendment 2 implicitly repealed the Hancock Amendment. Implicit repeal of constitutional provision is looked upon with great disfavor in the law. *State ex rel. Gordon v. Becker*, 49 S.W.2d 146, 147 (Mo. 1932). This contention is devoid of any explicit support in the language of Amendment 2, the underlying Constitutional provision it amended (Art. X, Section 11), or the language of the Hancock Amendment.

The plain language of Section 11 does not affect Art. X, §22. There is no room for judicial construction of a Constitutional provision that on its face is clear; its express language controls. *City of Hazelwood v. Peterson*, 48 S.W.3d 36, 39 (Mo. banc 2001).

There is no reasonable interpretation of Amendment 2 that can or should result in repeal of Section 22(a) by implication. The plain language of Amendment 2, the Hancock Amendment, and related statutes all suggest the contrary conclusion: Respondent Morgan County R-II School District was required to give effect to and comply with *both* of these limits on its taxing authority by obtaining voter approval before raising its tax levy rate above its maximum authorized current levy.

By their plain meanings, Amendment 2 and the Hancock Amendment provide two separate ceilings on Respondent School District's taxing authority in any given year. A school district can increase its levy to $2.75, or leave its levy at $2.75, without obtaining voter approval, *only if* $2.75 is not in excess of its maximum authorized current levy under Section 22(a).

The Circuit Court's construction of Amendment 2 was in error, and should be reversed as Respondent's maximum authorized current levy could not be exceeded without voter authorization.

Relief Requested

Taxpayers request that This Court find that a school district can increase its levy to $2.75, or leave its levy at $2.75, without obtaining voter approval, only if $2.75 is not in excess of its maximum authorized current levy under Section 22(a).

B. Assuming Respondent School District's 2000 maximum authorized current levy rate was $2.75, in 2001 when total assessed valuation growth exceeded the rate of growth in the price index, Section 22(a) of Article X required the levy rate to be reduced, because Section 11 of Article X did not authorize the levy rate to be left at $2.75 without voter approval, and Count II should have been substantively determined in favor of Appellants.

If This Court disagrees with Appellant's analysis of Point III.A above, and approves the initial action of Respondent School in raising its levy to $2.75 without voter approval, an issue remains. That issue is whether Amendment 2 operated as a permanent negation of the provision of Section 22(a) requiring tax rate reductions when growth exceeds inflation. Can School Districts leave their levy at $2.75 when valuation growth exceeds inflation growth, producing a revenue windfall to the School at taxpayer's expense? Appellants respectfully suggest there is no basis for this conclusion. There is no language in Amendment

2 that suggests an intent to negate the revenue lid imposed by the Hancock Amendment.

Appellants believe such a construction is contrary to the intent of voters in adopting Amendment 2, contrary to the language of Amendment 2, contrary to the intent of voters in adopting the Hancock Amendment, contrary to the language of the Hancock Amendment, and contrary to the provisions of legislation enacted after the adoption of Amendment 2 in which the legislature displays its understanding the revenue limit of Section 22 was not negated for Schools.

Assuming the truth of the Petition's allegations, the Morgan County School District left its levy rate at $2.75 in 2001. Its total assessed valuation was $154,544,577, which had grown 16% from 2000. As the price level or inflation growth was only 3.3%, its 2001 tax rate should have been reduced by 12.7% pursuant to the Hancock Amendment. Doing the math, the School District's revenue under a $2.75 levy would approximate $4,250,000. Under a $2.40 levy required by Hancock, its revenue would approximate $3,710,000. The approximate $540,000 difference is the windfall the School enjoyed at the taxpayers expense.

The discussion before in Point III.A applies equally here. In addition to that discussion, it is worthy of note that the language of statutory enactments since Amendment 2 demonstrates the Missouri legislature's understanding a $2.75 levy rate is still subject to the "rollback" requirement of Section 22(a). The legislature's understandings can be found in legislation enacted

contemporaneously with, and after, Amendment 2. These statutes now indicate that the Amendment 2 $2.75 tax rate is subject to reductions required by Section 22(a) of the Hancock Amendment. E.g., R.S.Mo. §§ 163.021.2, 163.015.2, 163.025.1, 163.011(14), 137.073.1(3). The General Assembly's authority to reduce tax rates via Section 137.073 below those maximum rates otherwise suggested by Amendment 2 is conferred by the Missouri Constitution:

"The general assembly may require by law that political subdivisions reduce the rate of levy of all property taxes the subdivisions impose whether the rate of levy is authorized by this constitution or by law." See Art. X, Sec. 10(c).

In 1997, both houses of the Missouri General Assembly ("Assembly") approved HJR 9 which proposed Amendment 2. That same year, the Assembly passed an amendment to R.S.Mo. § 163.021 determining criteria for state school aid eligibility, a statute which describes Missouri's state foundation formula for providing state aid to school districts. The amendment complemented Amendment 2 and provided: "that such school districts may levy for current school purposes and capital projects an operating levy not to exceed two dollars and seventy-five cents *less all adjustments required pursuant to article X, section 22 of the Missouri Constitution [the Hancock Amendment]."* R.S.Mo § 163.021.2 (emphasis added). This language survives today and clearly shows that the Assembly intended for the Hancock Amendment to apply even where it

reduces the tax rate limit below 2.75. Accord R.S.Mo. §§ 163.015.2 and 163.025.1.

A more recent expression of the Assembly confirms the continued vitality of the Hancock Amendment in the post- Amendment 2 school district tax rate setting process. Section 137.073, substantially revised in 2002, contains several explicit references to the Hancock Amendment limitation on school district tax rates. For example, in the definition of "tax rate ceiling," "a school district may levy the operating levy for school purposes required for the current year pursuant to subsection 2 of section 163.021, R.S.Mo [quoted above and also expressly limited by the Hancock Amendment], *less all adjustments required pursuant to article X, section 22 of the Missouri Constitution [the Hancock Amendment],* if such tax rate does not exceed the highest tax rate in effect subsequent to the 1980 tax year. This is the maximum tax rate that may be levied, unless a higher tax rate ceiling is approved by voters of the political subdivision…" R.S.Mo § 137.073.1(3) (emphasis added); accord R.S.Mo § 178.870. Accordingly, it is clear that the Missouri General Assembly intends for School Districts to reduce the $2.75 Amendment 2 rate when required by the Hancock Amendment.

If principles of construction need be resorted to, they support Appellants. In disputes between taxpayers and their taxing political subdivisions, any ambiguities should be resolved in favor of the taxpayer. See, e.g., *Old Warson Country Club v. Dir. of Revenue,* 933 S.W.2d 400, 403 (Mo. 1996).

Generally, where two different tax provisions of the Constitution are *in pari materia*, they should be construed together. Courts must seek to harmonize such laws, even though enacted at different times and found in different places. See *State ex rel Goldberg v. Barber & Sons Tobacco, Inc.*, 649 S.W.2d 859, 861 (Mo. 1983); *ITT Canteen Corp. v. Spradling*, 526 S.W.2d 11, 16 (Mo. 1975). If the provisions of Section 11 and Section 22 can be harmonized and read together to give meaning and effect to both, such harmonization should be performed by This Court.

As set forth above, Amendment 2 can be harmonized to give meaning to it as well as continued meaning of Section 22 (a). Amendment 2 is a tax rate limitation. Hancock is a tax revenue limitation. Amendment 2 was a maximum tax rate authorization, but it was subject to, and did not change, other limitations provided by law. Section 22(a) of Article X was such an other limitation. The language of Article X, Section 11(c) providing that the $2.75 rate of Amendment 2 "may be further limited by law" facilitates the conclusion that the Section 22 revenue limitation was intended to be read into the provisions of Section 11.

Therefore, Section 22(a) is still operative to require a School to reduce its levy below $2.75, if $2.75 would be in excess of the School's maximum authorized current levy. Section 22(a) requires the levy rate to be "rolled back" below $2.75. If the School wants to remain at $2.75 all it need do is obtain voter approval, as required by Section 22(a).

This is the most reasonable construction of the language of Amendment 2 and Section 22(a). It gives effect and meaning to both. Such a construction does not repeal one constitutional provision by implication from another. Such a construction is consistent with legislation enacted after the adoption of Amendment 2, indicating the $2.75 levy remains subject to reduction by operation of Section 22(a).

Relief Requested

Taxpayers request that This Court find that Section 22(a) is still operative to require a School to reduce its levy below $2.75, if $2.75 would be in excess of the School's maximum authorized current levy.

C. If Respondent School District in 2001 had reduced its levy below $2.75 pursuant to the requirements of Section 22(a) of Article X, it would not have been subject to reduced or lost state financial aid provided pursuant to Chapter 163 R.S.Mo, and Appellant taxpayers had standing to pursue this declaratory judgment, because the School District's interpretation that it would lose state aid result in direct pecuniary injury to Plaintiffs in the form of a tax rate higher than permitted by Section 22(a) of Article X, and Count III should have been substantively determined in favor of Appellants.

Count III alleged Respondent School District had refused to reduce its levy below $2.75 on the grounds if it did so it would lose state financial aid, a separate source of revenue provided in Chapter 163 R.S.Mo. Appellants' Petition named the Attorney General as Defendant to litigate the state's interest in this regard, in

order to assure the presence of all parties in interest. The circuit court dismissed the Attorney General simultaneous with dismissing the entire suit[48]

The School District in its Motion to Dismiss raised the issue of whether the Taxpayers have standing to bring Count III.[49] The Circuit Court cited no specific reason for dismissal of Count III in its Judgment, so the Western District Court of Appeals assumed that lack of standing was the reason for dismissal.

Appellants respectfully disagree with the Opinion of the Court of Appeals holding that Appellants lacked standing. Appellants do not believe the Court of Appeals understood the basis for Appellants' standing. This may have been due to the unusual procedural posture of this case.

The dispute concerns the interpretation and enforcement of Section 22(a) of Article X to the Missouri Constitution, the Hancock Amendment. The Court of Appeals Opinion concludes that Appellants lack standing to bring Count III, because they had an "indirect personal interest." We disagree.

Appellants have standing for two reasons: First they have a direct pecuniary interest in this issue as their tax rate was higher than it would have been if the School had complied with the Constitution; Second, they have standing because the constitution *confers* standing on them pursuant to Art X, §23.

---

[48] App. L.F. at 003, 016-018

[49] L.F. at 028.

Respondent School District incorporated its interpretation that it would lose state financial aid into its $2.75 property tax rate. A School District is authorized to set its own tax rate. Taxpayers are not authorized to ignore the tax rate contained in their tax bill. Taxpayers who believe the rate is unlawful must sue to have their interpretation decided. Appellant taxpayers were directly and pecuniarily affected by the School's interpretation: It resulted in the 2001 tax rate being higher than it should have been if Appellants' interpretation is correct.

The issue had a direct impact on Appellants: their tax bill was higher than it should have been. Their out of pocket tax payment was higher than it should have been. Their interest was pecuniary. They were interested in having the Hancock Amendment interpreted.

The dispute as to loss of state aid would be expected to be between the School District and the Department of Elementary and Secondary Education. However that dispute would only arise if the School in fact reduced its levy below $2.75 and DESE in fact reduced state aid to the School. Then the School would have cause to sue the state.

However, because the School implemented its interpretation in the form of the $2.75 tax rate, it precluded any issue between it and DESE. It precluded the need to see if DESE would reduce state aid. The consequence of precluding a real issue between the School and the state was to create or transfer the issue as one between property taxpayers and the School. The School District has attempted to eliminate its risk by refusing to roll back its levy below $2.75, as required by

Section 22(a) of Article X. This resulted in Appellants' tax bills being higher than allowed by Section 22(a). The risk was transferred by the School to its taxpayers. The issue arises in tax bills sent to Appellants, owed by Appellants, paid under protest by Appellants, and for which Appellants now seek interpretation and enforcement of Section 22(a).

Appellants have standing to bring Count III because the Hancock Amendment, the supreme law of Missouri, specifically gives them standing:

> "Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county, or other political subdivision shall have standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of section 16 through 22, inclusive, of this article..."

As This Court has recognized, Section 23 of Article X "gives taxpayers standing to bring 'actions for interpretation' of the Hancock Amendment." *Green v. Lebanon R-III School District*, 13 S.W.3d 278, 281 (Mo. 2000). This action was brought to have the question of whether compliance with the Missouri Constitution triggers operation of state statutes indicating compliance will cause loss of state aid. An interpretation of the effect of Section 22 on Chapter 163 is entailed. Appellants have standing because of a constitutional grant of standing.

If This Court rules Appellants lack standing, the issue will never be available for adjudication. All a School will need do is never roll its levy below $2.75, never risk lost state aid, and transfer the financial risk to taxpayers,

knowing they will not have standing to litigate the issue. The School's power to tax, and incorporate its interpretations of law into the tax rate, would be converted into the power to be the sole interpreter of law. There is no reason to exalt School Districts to the status of final interpreter of law. School Districts are to operate schools in compliance with the law. It is the function of the Courts to provide access to and resolution to such legal questions, "without sale, denial, or delay to prevent loss of property without due process." Sections 10 and 14 of Article I, Constitution of Missouri.

Once it is concluded that the Appellants have standing, the merits of whether a School reducing its levy below $2.75 by operation of the Hancock Amendment is subject to loss of state aid are before this Court. Appellants conclude, and so should Respondent School District, that compliance with the constitution should not cause loss of aid afforded pursuant to the provisions of statute.

Respondent School District erroneously asserts that reducing its levy below $2.75 would result in its losing state aid. While it is true that R.S.Mo §163.021(2) requires that school districts maintain a levy no less than $2.75, it includes an exemption that frees school districts from this requirement if the levy reduction was mandatory due to the provisions of Art. X, §22(a). The Missouri Constitution, Article X, §22 mandates that the levy rate be rolled back when property valuation outpaces inflation, independent of new construction and improvements. Because this provision applies to the School District, the fact that

it will be compelled to reduce its maximum authorized levy will have no effect on its eligibility to receive state aid in subsequent years.

Section 163.021 R.S.Mo. sets forth the eligibility requirements for school districts to receive state aid. In order to be eligible to receive state aid, a school district must meet the requirements provided in R.S.Mo § 163.021.1. That section requires school districts to meet four general requirements: (1) the school district must meet pupil attendance requirements, (2) the school district must maintain adequate, accurate records, (3) the school district must have an operating levy for school purposes of at least $1.25 per $100 assessed valuation, and (4) the school district must properly compute average attendance.

In addition, beginning with the 1998 tax year, no school district shall receive more state aid than it received in the 1993-94 school year, unless it has an operating levy for school purposes of at least $2.75 per $100 assessed valuations after all adjustments and reductions. R.S.Mo § 163.021.2. This limitation has one exception, however, beginning with the 1997-98 school year: Any school district which is required, pursuant to the Hancock Amendment, to reduce its operating levy below the $2.75 minimum required above "*shall not be construed to be in violation of this subsection for making such tax rate reduction*." R.S.Mo § 163.021.2. The statute goes on to provide that a school district may levy the minimum rate required by that subsection (the $2.75 rate), *"less all adjustments required by [the Hancock Amendment]*." *Id.*

This language, in addition to confirming that when Hancock Amendment requires a tax rate less than $2.75 the School District must respect that lower limit, also confirms that School Districts will still be eligible to receive state aid if they are compelled to make such a reduction in their tax rates. Tax rate reductions required by Section 137.073 and the Hancock Amendment should not disqualify Respondents from receiving state aid. See Mo. Op. Att'y Gen. 122-85 (1985). Moreover, schools have a Constitutional guarantee that the state-financed proportion of their support will not be reduced. Mo. Const. Art. X, § 21; *Fort Zumwalt School District v State of Missouri*, 896 S.W.2d 918, 922 (Mo. 1995).

Relief Requested

Taxpayers request that This Court find that taxpayers do have standing to bring Count III, and that This Court declare that, under the law, a School District that reduces its levy below $2.75 in compliance with Section 22(a) of Article X of the Hancock Amendment is not subject to loss of state aid provided pursuant to Chapter 163 R.S.Mo.

IV. The Circuit Court erred in dismissing Count IV of the taxpayers' Petition, which seeks a refund of taxes paid under protest pursuant to Section 139.031 R.S.Mo, for failure to state a claim with sufficient specificity because, the allegations of the Petition that total assessed valuation of property in the School District grew 16% while the general price level grew 3.3% between 2000 and 2001, that the School District's levy rate remained the same from 2000 to 2001, that the School District's 2001 tax rate was unlawfully high in

violation of Section 22(a), Article X of the Missouri Constitution, that Appellant taxpayers paid their 2001 taxes under protest pursuant to Section 139.031 R.S.Mo, that they were suing for a refund pursuant to Section 139.031 R.S.Mo, were sufficient to state a claim upon which relief could be granted.

Standard of Review

Appellate courts give no deference to inferior courts on questions of law. *MFA Mut. Ins. Co. v. Home Mut. Ins. Co.,* 629 S.W.2d 447, 450 (Mo. App. 1982). When reviewing the decision of a lower court that erroneously applied or interpreted the law, the reviewing court uses its own independent judgment. *All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. 1994). *Dial v. Lathrop R-II School Dist*., 871 S.W.2d 444, 446 (Mo. 1994). *House of Lloyd, Inc. v. Director of Revenue, State of Mo.,* 824 S.W.2d 914, 916 (Mo. 1992). *City of Cabool v. Missouri State Bd. of Mediation*, 689 S.W.2d 51, 54 (Mo. 1985). This court is therefore not bound by the legal conclusions of the lower courts, and declares the law on its own authority.

The general standard of review is set forth in *Bosch v. St. Louis Healthcare Network*:

> "In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the following standard of review applies:

> "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences there from. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case."

41 S.W.3d 462, 464 (Mo. 2001).

"The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied." *State v. Plastec, Inc.*, 980 S.W.2d 152, 155 (Mo. App. E.D. 1998).

Argument

The Circuit Court, upon review of Respondent's motion to dismiss for failure to state a claim for which relief could be granted, was required to liberally construe the Taxpayers' Petition and accept all facts alleged as true and construed in the light most favorable to the Taxpayers. *Behrenhausen v. All About Travel, Inc.*, 967 S.W.2d 213, 216 (Mo. App. W.D. 1998). Missouri Rule 55.05(1) requires Petitions setting forth a claim for relief to contain "a short and plain statement of the facts showing that the pleader is entitled to relief." This Court has interpreted this rule to mean that Petitioners need only plead ultimate facts. *ITT*

Commercial Finance Corporation v. Mid-America Marine Supply Corporation, 854 S.W.2d 371, 379 (Mo. banc 1993); *Scheibel v. Hillis*, 531 S.W.2d 285, 290 (Mo banc 1976). A motion to dismiss is improper where a petitioner pleads ultimate facts or allegations from which to infer those facts, and the "lack of specific facts does not invite dismissal so long as complaint 'give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *ITT Commercial Finance Corp*., 854 S.W.2d at 379.

In this case, the Taxpayers alleged the following ultimate facts in their Petition in support of Count IV: the levy rates issued by the Respondent School District in 1998, 1999, 2000, and 2001 (paragraphs 14-16, 19); that Article X, section 22(a) requires a levy reduction in any year in which assessed valuation of property, less the value of new construction and improvements, is greater than the increase in the general price level (paragraph 9); that 2001 was a biennial general reassessment year, and that local assessed valuation increased 16%, while the rate of inflation growth was 3.3% (paragraph 17-18); that the School District imposed a levy of $2.75 in 2000 and 2001, and that $2.75 was in excess of that allowed by law (paragraphs 16, 19, 46).[50] The Petition further stated that the taxpayers paid their taxes under protest and filed suit, pursuant to R.S.Mo § 139.031., to recover

[50] L.F. at 006-008, 014. Count IV of Taxpayer's Petition consists of paragraphs 44 through 47, and paragraph 44 incorporates by reference the allegations set forth in paragraphs 1 through 43 of the Petition. L.F. at 014.

the property taxes levied in excess of that permitted by law (paragraph 47).[51]

These facts provided the Collector and School District with notice of the Taxpayers' claims and the grounds therefore. Assuming the truth of these allegations, and viewing them in the light most favorable to the taxpayers, the Petition set forth sufficient information to the Respondents of the character of the evidence to be introduced and the issues to be tried with respect to the taxpayer's Count IV seeking refund and/or credit for taxes paid under protest pursuant to section 139.031 R.S.Mo.

Under Missouri Rule 55.16, it is sufficient for a Petition "to aver generally that all conditions precedent have been performed or have occurred."

Therefore, as the Court of Appeals correctly determined, "[t]he taxpayers' petition, when viewed in the light most favorable to their claim, was sufficiently pleaded."[52] *Thompson v. Hunter*, Case No. WD 61742 (Ct. App. W.D., Feb. 18, 2003).

---

[51] L.F. at 014.

[52] The pleading under consideration by the Circuit Court at the time it rendered its judgment was a "Motion to Dismiss Count IV of Plaintiff's Petition, or in the Alternative, Strike Certain Allegations and For a More Definite Statement." If This Court determines the Taxpayers' Petition was insufficiently pleaded, the Court should follow its prior precedent in which it held that "[t]he proper remedy when a party fails to sufficiently plead the facts is a motion for more definite

Relief Requested

Plaintiffs request that the dismissal of Count IV premised upon the insufficient of pleading be reversed, and that, in accordance with Points I, II, and III, that the Circuit Court be directed to enter judgment in favor of Appellants on Count IV, with remand for the Circuit Court to determine the amount of refund to be afforded each of the individual Appellants.

V. The Circuit Court erred in dismissing Count V of Appellants' Petition, seeking an award of attorneys fees and costs for successful enforcement of Section 22 of Article X of the Missouri Constitution pursuant to Section 23 of Article X, on the ground that, under the allegations of the Petition Appellants were not entitled to such recovery, because Section 23, Article X of the Missouri Constitution provides that a taxpayer is entitled to costs, including reasonable attorneys' fees, if he successfully brings suit to enforce the provisions of Sections 16-22 of Article X in that the basis of the taxpayers' lawsuit is the enforcement of Section 22 of Article X, as set forth above in Points I, II, III, and IV, and if the taxpayers are successful, Section 23 of Article X entitled them to attorneys' fees and costs.

---

statement pursuant to Rule 55.27(d)." *State ex rel. Harvey v. Wells*, S.W.2d 546, 547 (Mo.banc 1997).

Standard of Review

The general standard of review is set forth in *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462 (Mo. 2001): "In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the following standard of review applies:

> "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case."[53]
>
> "The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied."[54]

Argument

Respondent Morgan County R-II School District is empowered to set its own tax rate. In so doing, the School District implemented its own interpretations of law. The School decided the 1998 Amendment to Section 11 of Article X

---

[53] *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. 2001)

[54] *State v. Plastec, Inc.*, 980 S.W.2d 152, 155 (Mo. App. E.D. 1998)

authorized it to raise its levy to $2.75 without voter approval, despite the provisions of Section 22(a) of Article X prohibiting a levy rate in excess of the maximum authorized current levy in the absence of voter approval. In 2001 the School decided, when total assessed valuation had increased 16% but the general price level increased only 3%, it was not required by Section 22(a) to reduce or "roll back" its levy. The result of the School's interpretation was a tax revenue windfall to the School at the expense of property taxpayers.

The School also refused to reduce or roll back its levy based upon its interpretation that, if it reduced its levy below $2.75 pursuant to the requirements of Section 22(a), it would have lost state financial aid. Again the result of the School's interpretation was a tax revenue windfall at the expense of taxpayers.

All of the School's interpretations of Section 22(a) were built into the tax rate because the School District had the power of taxation. It was incumbent upon the taxpayers to sue to overturn these interpretations in order to enforce the provisions of the Hancock Amendment. The provisions of the Hancock Amendment provide both taxpayer standing to enforce the Hancock Amendment, the right to recover costs and attorneys fees from the School District if the taxpayers prevail.

Section 23 of Article X provides:

"**Taxpayers may bring actions for interpretations of limitations.—Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county, or other political subdivision shall have**

standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article, and, <u>if the suit is sustained, shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit</u>." (emphasis by underlining supplied)

Count V of Appellants' Petition asked for award of costs and attorneys fees for enforcing sections 16-22 of Article X as requested in Counts I, II, III, or IV of the Petition.

The Circuit Court's Judgment did not make a specific ruling in dismissing Count V. Appellants presume dismissal was based upon paragraph 4 of the Judgment, holding "Because Proposition No. 2 authorized the School District to adopt an operating tax levy of up to $2.75 without voter approval, the Plaintiffs are not entitled to the relief which they seek in their Petition. All claims set forth in the Petition are therefore ordered stricken and dismissed." App. L.F. 042.

The Western District's February 18, 2003 Opinion, at pages 12-13, reversed the dismissal of Count V as a consequence of concluding Counts I, II, and IV of the Petition set forth viable claims to enforce Section 22 of Article X.

Case law applying Section 23 of Article X is clear that individual taxpayer actions enforcing the provisions of Sections 16-22 warrant award of costs and attorney's fees against the applicable governmental unit violating those sections. In *City of Hazelwood v Peterson*, 48 S.W.3d 36, 41 (Mo 2001), the Missouri

Supreme Court held that "the Hancock Amendment provides that a taxpayer who prevails in a claim brought under article X, section 23, "shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit." An award of attorneys' fees against a city was upheld, where, as here, the Hancock issue was tried in the context of a suit for refund of taxes paid under protest.

In *Gilroy-Sims & Associates v Downtown St. Louis Business District*, 729 S.W.2d 504, 507-508 (Mo App 1987), the Eastern District affirmed the award of attorneys fees to a taxpayer against the City of St. Louis for expenditures of a Count seeking enforcement of the Hancock Amendment.

Count V of Plaintiffs' Petition states a cause of action for costs and attorneys' fees under Section 23. Counts I, II, III, and IV all seek interpretation or enforcement of Section 22(a) of Article X. If any of Counts I, II, III, or IV are reversed and remanded, Count V should also be reversed and reinstated pending the final result of Counts I, II, III, or IV. If This Court directs Judgment in favor of Plaintiffs on either of Counts I, II, III, or IV, the dismissal of Count V should be reversed with directions to award attorney's fees.

Relief Requested

Plaintiff request that the Circuit Court's judgment be reversed. Plaintiffs suggest that, assuming This Court Agrees with Plaintiffs' Point I, II, III, and IV, that the case be remanded with directions to enter judgment on Count V in favor

of Plaintiffs, and remanded with direction to determine the attorney's fees and costs expended.

Respectfully Submitted,

ANDERECK, EVANS, MILNE,
PEACE & JOHNSON, L.L.C.

By_____
Craig S. Johnson MO Bar No. 28179
Lisa Cole Chase MO Bar No. 51502
The Col. Darwin Marmaduke House
700 East Capitol
Post Office Box 1438
Jefferson City, Missouri 65102
Telephone: (573) 634-3422
Facsimile: (573) 634-7822
Email: CJohnson@AEMPB.com
Email: lisachase@AEMPB.com

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing Appellants' Brief conforms with Missouri Rule 84.06(b), consisting of 1,368 lines of text and 13,955 words, that the accompanying disk has been scanned for viruses and it is virus-free, and that a true and accurate copy of the foregoing brief and a copy of the accompanying disk which have all been scanned for viruses and are hereby certified as virus-free, was mailed, via U.S. Mail, postage prepaid, this 30th day of June, 2003, to all attorneys of record in this proceeding.

Alex Barlett
Attorneys at Law
P.O. Box 1251
Jefferson City, MO 65102

Marvin Opie
Morgan County Prosecuting Attorney
211 East Newton
Versailles, MO 65084

Todd S. Jones
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102

For amicus curiae
Ann K. Covington
Juan D. Keller
Bryan Cave LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102

Joe Rebein
Susan A. Berson
Eric T. Mikkelson
Shook, Hardy & Bacon, LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2118

_____
Lisa Cole Chase Mo. Bar No. 51502

APPENDIX

TABLE OF CONTENTS: